

the procedures of § 39.3 of this part; provided however, that an application for reinstatement may rely upon previously submitted materials that still pertain to, and accurately describe, current conditions.

(2) A derivatives clearing organization that accepts for clearing a new product that is a swap shall comply with the requirements of § 39.5 of this part.

(d) *Orders regarding competition.* An applicant for registration or a registered derivatives clearing organization may request that the Commission issue an order concerning whether a rule or practice of the organization is the least anticompetitive means of achieving the objectives, purposes, and policies of the Act.

(e) *Holding securities in a futures portfolio margining account.* A derivatives clearing organization seeking to provide a portfolio margining program under which securities would be held in a futures account as defined in § 1.3(vv) of this chapter, shall submit rules to implement such portfolio margining program for Commission approval in accordance with § 40.5 of this chapter. Concurrent with the submission of such rules for Commission approval, the derivatives clearing organization shall petition the Commission for an order under section 4d of the Act.

**§ 39.5 Review of swaps for Commission determination on clearing requirement.**

(a) *Eligibility to clear swaps.* (1) A derivatives clearing organization shall be presumed eligible to accept for clearing any swap that is within a group, category, type, or class of swaps that the derivatives clearing organization already clears. Such presumption of eligibility, however, is subject to review by the Commission.

(2) A derivatives clearing organization that wishes to accept for clearing any swap that is not within a group, category, type, or class of swaps that the derivatives clearing organization already clears shall request a determination by the Commission of the derivatives clearing organization's eligibility to clear such a swap before accepting the swap for clearing. The request, which shall be filed electroni-

cally with the Secretary of the Commission, shall address the derivatives clearing organization's ability, if it accepts the swap for clearing, to maintain compliance with section 5b(c)(2) of the Act, specifically:

(i) The sufficiency of the derivatives clearing organization's financial resources; and

(ii) The derivative clearing organization's ability to manage the risks associated with clearing the swap, especially if the Commission determines that the swap is required to be cleared.

(b) *Swap submissions.* (1) A derivatives clearing organization shall submit to the Commission each swap, or any group, category, type, or class of swaps that it plans to accept for clearing. The derivatives clearing organization making the submission must be eligible under paragraph (a) of this section to accept for clearing the submitted swap, or group, category, type, or class of swaps.

(2) A derivatives clearing organization shall submit swaps to the Commission, to the extent reasonable and practicable to do so, by group, category, type, or class of swaps. The Commission may in its reasonable discretion consolidate multiple submissions from one derivatives clearing organization or subdivide a derivatives clearing organization's submission as appropriate for review.

(3) The submission shall be filed electronically with the Secretary of the Commission and shall include:

(i) A statement that the derivatives clearing organization is eligible to accept the swap, or group, category, type, or class of swaps for clearing and describes the extent to which, if the Commission were to determine that the swap, or group, category, type, or class of swaps is required to be cleared, the derivatives clearing organization will be able to maintain compliance with section 5b(c)(2) of the Act;

(ii) A statement that includes, but is not limited to, information that will assist the Commission in making a quantitative and qualitative assessment of the following factors:

(A) The existence of significant outstanding notional exposures, trading liquidity, and adequate pricing data;

(B) The availability of rule framework, capacity, operational expertise and resources, and credit support infrastructure to clear the contract on terms that are consistent with the material terms and trading conventions on which the contract is then traded;

(C) The effect on the mitigation of systemic risk, taking into account the size of the market for such contract and the resources of the derivatives clearing organization available to clear the contract;

(D) The effect on competition, including appropriate fees and charges applied to clearing; and

(E) The existence of reasonable legal certainty in the event of the insolvency of the relevant derivatives clearing organization or one or more of its clearing members with regard to the treatment of customer and swap counterparty positions, funds, and property;

(iii) Product specifications, including copies of any standardized legal documentation, generally accepted contract terms, standard practices for managing any life cycle events associated with the swap, and the extent to which the swap is electronically confirmable;

(iv) Participant eligibility standards, if different from the derivatives clearing organization's general participant eligibility standards;

(v) Pricing sources, models, and procedures, demonstrating an ability to obtain sufficient price data to measure credit exposures in a timely and accurate manner, including any agreements with clearing members to provide price data and copies of executed agreements with third-party price vendors, and information about any price reference index used, such as the name of the index, the source that calculates it, the methodology used to calculate the price reference index and how often it is calculated, and when and where it is published publicly;

(vi) Risk management procedures, including measurement and monitoring of credit exposures, initial and variation margin methodology, methodologies for stress testing and back testing, settlement procedures, and default management procedures;

(vii) Applicable rules, manuals, policies, or procedures;

(viii) A description of the manner in which the derivatives clearing organization has provided notice of the submission to its members and a summary of any views on the submission expressed by the members (a copy of the notice to members shall be included with the submission); and

(ix) Any additional information specifically requested by the Commission.

(4) The Commission must have received the submission by the open of business on the business day preceding the acceptance of the swap, or group, category, type, or class of swaps for clearing.

(5) The submission will be made available to the public and posted on the Commission Web site for a 30-day public comment period. A derivatives clearing organization that wishes to request confidential treatment for portions of its submission may do so in accordance with the procedures set out in §145.9(d) of this chapter.

(6) The Commission will review the submission and determine whether the swap, or group, category, type, or class of swaps described in the submission is required to be cleared. The Commission will make its determination not later than 90 days after a complete submission has been received, unless the submitting derivatives clearing organization agrees to an extension. The determination of when such submission is complete shall be at the sole discretion of the Commission. In making a determination that a clearing requirement shall apply, the Commission may impose such terms and conditions to the clearing requirement as the Commission determines to be appropriate.

(c) *Commission-initiated reviews.* (1) The Commission, on an ongoing basis, will review swaps that have not been accepted for clearing by a derivatives clearing organization to make a determination as to whether the swaps should be required to be cleared. In undertaking such reviews, the Commission will use information obtained pursuant to Commission regulations from swap data repositories, swap dealers, and major swap participants, and any other available information.

(2) Notice regarding any determination made under paragraph (c)(1) of this section will be made available to

the public and posted on the Commission Web site for a 30-day public comment period.

(3) If no derivatives clearing organization has accepted for clearing a particular swap, group, category, type, or class of swaps that the Commission finds would otherwise be subject to a clearing requirement, the Commission will:

- (i) Investigate the relevant facts and circumstances;
- (ii) Within 30 days of the completion of its investigation, issue a public report containing the results of the investigation; and
- (iii) Take such actions as the Commission determines to be necessary and in the public interest, which may include requiring the retaining of adequate margin or capital by parties to the swap, group, category, type, or class of swaps.

(d) *Stay of clearing requirement.* (1) After making a determination that a swap, or group, category, type, or class of swaps is required to be cleared, the Commission, on application of a counterparty to a swap or on its own initiative, may stay the clearing requirement until the Commission completes a review of the terms of the swap, or group, category, type, or class of swaps and the clearing arrangement.

(2) A counterparty to a swap that wishes to apply for a stay of the clearing requirement for that swap shall submit a written request to the Secretary of the Commission that includes:

- (i) The identity and contact information of the counterparty to the swap;
- (ii) The terms of the swap subject to the clearing requirement;
- (iii) The name of the derivatives clearing organization clearing the swap;
- (iv) A description of the clearing arrangement; and
- (v) A statement explaining why the swap should not be subject to a clearing requirement.

(3) A derivatives clearing organization that has accepted for clearing a swap, or group, category, type, or class of swaps that is subject to a stay of the clearing requirement shall provide any information requested by the Commission in the course of its review.

(4) The Commission will complete its review not later than 90 days after issuance of the stay, unless the derivatives clearing organization that clears the swap, or group, category, type, or class of swaps agrees to an extension.

(5) Upon completion of its review, the Commission may:

- (i) Determine, subject to any terms and conditions as the Commission determines to be appropriate, that the swap, or group, category, type, or class of swaps must be cleared; or
- (ii) Determine that the clearing requirement will not apply to the swap, or group, category, type, or class of swaps, but clearing may continue on a non-mandatory basis.

#### § 39.6 [Reserved]

#### § 39.7 Enforceability.

An agreement, contract or transaction submitted to a derivatives clearing organization for clearing shall not be void, voidable, subject to rescission, or otherwise invalidated or rendered unenforceable as a result of:

- (a) A violation by the derivatives clearing organization of the provisions of the Act or of Commission regulations; or
- (b) Any Commission proceeding to alter or supplement a rule under section 8a(7) of the Act, to declare an emergency under section 8a(9) of the Act, or any other proceeding the effect of which is to alter, supplement, or require a derivatives clearing organization to adopt a specific rule or procedure, or to take or refrain from taking a specific action.

#### § 39.8 Fraud in connection with the clearing of transactions on a derivatives clearing organization.

It shall be unlawful for any person, directly or indirectly, in or in connection with the clearing of transactions by a derivatives clearing organization:

- (a) To cheat or defraud or attempt to cheat or defraud any person;
- (b) Willfully to make or cause to be made to any person any false report or statement or cause to be entered for any person any false record; or
- (c) Willfully to deceive or attempt to deceive any person by any means whatsoever.